



**SCOTTSDALE BOARD OF ADJUSTMENT
KIVA - CITY HALL
3939 N. DRINKWATER BOULEVARD
AUGUST 6, 2003
APPROVED MINUTES**

PRESENT: James Vail, Chair
Carol Perica, Board Member
Norman Sands, Board Member
Laurel Walsh, Board Member

ABSENT: Terry Kuhstoss, Vice Chair
Jennifer Goralski, Board Member
Neal Waldman, Board Member

STAFF: Janis Villalpando
Kurt Jones
Alan Ward

CALL TO ORDER

The regular meeting of the Scottsdale Board of Adjustment was called to order by Chair Vail at 6:02 p.m.

ROLL CALL

A formal roll call confirmed members present as stated above.

MINUTES APPROVAL

1. May 7, 2003
2. June 4, 2003

APPROVED 9-3-03

BOARD MEMBER WALSH MOVED FOR APPROVAL OF THE MAY 7, 2003 MINUTES AS SUBMITTED. BOARD MEMBER SANDS SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY BY A VOTE OF FOUR (4) TO ZERO (0).

BOARD MEMBER PERICA MOVED TO APPROVE THE JUNE 4, 2003 MINUTES AS SUBMITTED. BOARD MEMBER WALSH SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY BY A VOTE OF FOUR (4) TO ZERO (0).

REGULAR AGENDA

3. **6-BA-2003** (Khalaj Residence) applicant/owner, for a variance from the 24-foot height restriction to allow a 28-foot ridgeline on a property located at 12670 E Cochise Drive with Single Family Residential, Environmentally Sensitive Lands zoning (R1-43 ESL

CHAIR VAIL explained the function of the Board of Adjustment and the constraints placed upon the Board by State law. He also explained the format for applicant testimony and public comment. Chair Vail pointed out that the applicant must receive four affirmative votes for approval of the variance, and offered the applicant the opportunity to request a continuance before or after the discussion, as only four Board Members were present

MR. ALAN WARD, staff planner, presented the case per the staff packet. He reviewed the applicant's request, and noted that the City had received two letters in support and one phone call expressing concerns. Mr. Ward went on to state that the applicant's request had been submitted prior to the effective date of the 24-foot requirement, but that the ordinance in effect at the time required a height no greater than 26 feet.

BOARD MEMBER PERICA inquired as to the City's protocol to inform the public regarding pending ordinances and adoption time. Mr. Jones responded that newspaper notice is a statutory requirement, and that signs were posted, post cards were sent to residents in the area, and open houses were held to inform the public. He added that the ordinance, once adopted, becomes effective 30 days after the approval date.

BOARD MEMBER PERICA also asked about the average length of time for permit approval. Mr. Jones replied that the first review averaged 30 days, with second and third reviews approximately 15 days.

BOARD MEMBER WALSH asked if the professionals working with the applicant had previous experience in working with the City of Scottsdale and familiarity with

the time required to obtain a building permit. Mr. Ward indicated that he was unable to respond to the question.

(Chair Vail opened public testimony)

MR. WILLIAM MILLER, representing the applicant, addressed the Board. Mr. Miller pointed out that his reading of the special circumstances required by the first criteria was contingent upon the date the plans were submitted. He stated that the plans had been submitted on April 24, 2003 and that the notice of the new ordinance did not apply until May 1, 2003. He cited the "First in time, first in right" doctrine, and stated his assertion that the doctrine was the basis for a due process argument upholding the primacy of the April 24, 2003 submittal date. He also noted that he had been unable to find any ordinance requirement regarding the date of the building permit. Mr. Miller referred to the eleven thousand square foot for the proposed residence, and stated that the 28-foot height was necessary for a dwelling of that size. Mr. Miller observed that the adjacent homes have heights of 28, 29, and 27 feet and that a 28-foot variance as requested by the applicant would have no impact on the neighboring residences or their view.

MR. DAVID KHALAJ, applicant, addressed the Board and expressed his commitment to ESLO principles and preservation of the neighborhood. Mr. Khalaj provided evidence of his community involvement in Ahwatukee, and stated that he simply wanted to build a beautiful home in the north Scottsdale area.

MR. VITO DASCOLI, Intimate Approach Architects, commented on the size of the home and the need for a ridgeline that would be proportional to that size. He referred to the fact that the setbacks and lot coverage were governed by zoning ordinance and that the size of the home was within the allowable square footage. He noted that the other homes in the area have a similar ridge height.

BOARD MEMBER PERICA noted that the ordinance at the time of the application for the building permit stated that the maximum height was 26 feet. Mr. Dascoli replied that he was aware of that and based on the needs of the family and the desire to match other residences in the area, and decided to proceed with the 28 feet and take the necessary steps to obtain approval.

MR. JOHN KOSOV, Kodiak Builders, reiterated from a builder's perspective, the need for the ceiling heights as stated for a home of 11,000 square feet.

(Chair Vail closed public testimony.)

BOARD MEMBER WALSH asked for legal clarification regarding the issue of whether the permit date or the application date governed. Ms. Villalpando suggested that Mr. Miller conclude his presentation before she responded to the question.

MR. MILLER once again referred to the "First in time, first in right" doctrine, noting that his argument was based on Common Law of the State of Arizona.

CHAIR VAIL inquired as to whether the primacy of the date of the permit rather than that of the application had been written as part of the Ordinance or if it was an administrative decision. Ms. Villalpando replied that it was neither, but rather the City's understanding of Common Law. She went on to state, that in her opinion, the "First in time, first in right" doctrine relates to a different area of the law. Ms. Villalpando observed that City Council had chosen not to include a grandfather clause in the latest ESLO update, and that the applicant did not have a vested right to the 26-foot height.

BOARD MEMBER WALSH addressed the issue of special circumstances and stated her view that this was an esthetic issue. She referred to an obligation by the Board to uphold City code. Board Member Walsh noted that the applicant's plans would not have been in compliance with the existing code at the time of the permit submittal and that the applicant must have known he would have to come before the Board for a variance anyway.

CHAIR VAIL inquired as to whether or not a 26- foot ridgeline would be satisfactory to the applicant. Mr. Miller replied that it would.

CHAIR VAIL observed the heights of the residences surrounding the subject property and noted that there would be no problem with obstruction of views to the north, east and west, and that there was no residence to the south. He commented that he could conceivably justify the four criteria, but at a height of 26 feet, rather than 28 feet. Chair Vail asked for direction from Ms. Villalpando as to a vote to approve a 26-foot variance instead of 28 feet. He also asked, in the event a vote to approve the 28-foot variance was denied, if that would be interpreted as a material change, or whether the one-year statutory requirement for reapplication would apply. Ms. Villalpando replied that the applicant would have to resubmit a new application for a 26-foot variance and that the Board had the authority to determine the issue of a material change. If the Board determined that there was a material change, the matter could be resubmitted and a hearing scheduled. Ms. Villalpando also advised that provisions for notice must be met prior to a new hearing.

BOARD MEMBER WALSH stated that she adhered strictly to the parameters imposed by law upon the Board and that she would not be disposed to vote in favor of a 26-foot variance in light of the ESLO update. Ms. Villalpando cautioned against discussing an issue not currently before the Board.

MR. MILLER asked for approval of a continuance on the application zoning process hearing in order for the applicant to resubmit plans consistent with the law in effect as of April 24, 2003. He requested further that the Board of

Adjustment reconvene its September 3, 2003 meeting and consider the issues based on a 26-foot rather than a 28-foot application.

BOARD MEMBER PERICA MOVED TO CONTINUE CASE 6-BA-2003 TO THE SEPTEMBER 3, 2003 MEETING. BOARD MEMBER WALSH SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY BY A VOTE OF FOUR (4) TO ZERO (0),

ADJOURNMENT

With no further business to discuss, the regular meeting of the Scottsdale Board of Adjustment was adjourned at 7:08 p.m.

Respectfully submitted,

"For the Record" Court Reporters